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No. 06-1078

Supreme Court, U.S.
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In The Supreme Court of the United States

DEJA VU OF NASHVILLE, INC., a Tennessee corporation, and MERONEY ENTERTAINMENT, INC., a Tennessee corporation,

Petitioners,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S "STATEMENT OF THE CASE"

Respondent asserts that this case was "tried" in the district court from April 12-15, 1999. Opp. 2. No, it was not. Those are the dates when the lower court conducted an evidentiary hearing on the Plaintiffs' second motion for *preliminary injunction*. *See* App. 1. As stated in the petition, at no time did the district court ever indicate that it was combining the preliminary injunction hearing with the trial; Plaintiffs were *never* afforded a full trial on the merits in regard to their constitutional claims; and the district court even conducted a status conference *after* the evidentiary hearing for the purpose of preparing the case for trial (excerpts of that hearing appear at Pet. App. 423-37).

Next, Metro points out – apparently in an effort to imply that the Plaintiffs "litigated" their secondary effects challenge – that Dr. Daniel Linz testified on behalf of the Plaintiffs at the preliminary injunction hearing and that he has written on, and testified in other matters concerning, the subject of adverse secondary effects. Opp. 2. While Metro includes testimony concerning his credentials (Opp. App. 20-23), missing from the opposition, however, is any reference to Dr. Linz's *substantive* testimony *in this case* concerning adverse secondary effects, which is not surprising because there was none. Dr. Linz testified on other issues, and accompanying this reply is a letter requesting the ability to lodge the full transcripts of his testimony with the Clerk of this Court in order to demonstrate just that.

Then, in a linguistic slight of hand, Metro attempts to convince this Court that the Plaintiffs were somehow

required to bring *all* of their constitutional challenges against Ch. 6.54 at the preliminary injunction hearing, irrespective of whether those claims were ripe for adjudication at that time. The record in this case simply, but unequivocally, refutes any such assertion. In the Order of October 30, 1999, relied upon by the Respondent (Opp. 3), the Magistrate footnotes the very statement quoted by Metro as follows: "In other words, the plaintiffs shall not piecemeal *motions for preliminary injunction* but shall raise all grounds in support of *a motion for preliminary injunction* at one time." Pet. App. 129 n. 1 (emphasis added). Nothing in that order precluded the Plaintiffs from raising other challenges (or submitting additional evidence) *at trial*.

Nor is Respondent's reference to the motion to review the Magistrate's protective order (Opp. App. 26) dispositive of this issue. All that the Plaintiffs asserted in that document was that the district court should review and reverse the Magistrate's ruling because the requested discovery was relevant to the Plaintiffs' challenges that could be raised in the second motion for preliminary injunction. *But the district court never ruled on that motion*; the Plaintiffs therefore did not obtain their desired discovery; and they therefore did not litigate their "secondary effects" claim in their second motion for preliminary injunction.

Metro also misses the point regarding the Petitioners' description of Board proceedings that occurred *after* the preliminary injunction hearing. Opp. 4-5. The purpose of discussing that evidence, which is part of the district court record below but which was *not* part of the secondary motion for preliminary injunction (since it did not exist at the time), was to illustrate to this Court the evidence that the Plaintiffs *could* have submitted *at trial* on their claim

that the challenged Ordinance impermissibly granted unbridled discretion to the Board, if the district court had not vacated the permanent injunction and then contemporaneously re-entered final judgment without affording the Plaintiffs such a trial on their claims. *See* Pet. 28-29.

Moreover, while Metro attempts to assert that the inclusion of one of the Board transcripts was "completely misleading" since Deja Vu ultimately received its license (Opp. 5), such a contention is belied by the simple fact that the Petitioners flat out told this Court that Deja Vu's application was ultimately *granted*. Pet. 8.

Finally, the claim of Metro that a license or permit applicant/holder need not appear before the Board in a public hearing is disingenuous. First, the meetings of the Board are, of course, required to be open pursuant to state statute. T.C.A. §8-44-101 to 108. Second, the Board has the authority to subpoena witnesses to testify before it (§6.54.020(E)(3) (Pet. App. 301)), which could clearly include the applicant. In addition, "[r]efusal or failure [of the applicant] to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate with any investigation," constitutes an admission that the applicant is ineligible for such license and "shall" be grounds for denial thereof by the Board. *See*, *e.g.*, §6.54.040(C)(12) (clarification added) (Pet. App. 311-12). Third, an applicant/licensee would certainly have reason to be present at a hearing regarding the denial of an application or the suspension/revocation of that person's license/permit. *See*, *e.g.*, §6.54.040(E)(1)(c) (Pet. App. 314) and §6.54.150(E)(3) (Pet. App. 349) (an applicant's/licensee's failure to appear at a hearing constitutes a waiver of the right to present evidence to the Board).

I. THE RESPONDENT SIMPLY DOES NOT ADDRESS THE CONFLICTS IN THE LOWER COURTS.

Initially, the Respondent goes to quite some lengths to argue that governments are not required to justify secondary effects-based laws with empirical evidence. Opp. 7-11. But that is not the conflict raised by the Petitioners, and this Court has held in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), that municipalities need not conduct their own secondary effects studies so long as whatever "evidence" the government relies upon is reasonably believed to be relevant to the problems that it purports to address. *Id.* at 51-52. The problem becomes, however, determining what evidence is *relevant* to attacking, and what amount of evidence is sufficient to *successfully* challenge, a government's contention that certain legislation is necessary because of a concern of adverse secondary effects. And, not surprisingly, the Respondent has failed to articulate any clarity in the lower appellate courts concerning just what evidence *would* either "demonstrat[e] that the municipality's evidence does not support its rationale," or "dispute[] the municipality's factual findings," in terms of the statements in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002).

Rather, Metro simply contends that the "evidence" that a municipality purportedly relies upon is *simply not subject to challenge.* Succinctly, the Respondent states that "[e]xpert testimony or similar studies that question the *truth* of studies upon which a municipality relies are not germane to the *Renton* analysis." Opp. 14 (emphasis in original). But what then, in light of *Alameda Books*, *is germane* to the *Renton* analysis? The cases as cited in the petition demonstrate that there is no consensus or

uniformity whatsoever in the lower courts, and two decisions cited by Metro illustrate this conflict.

In *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006),[1] the Tenth Circuit remanded a secondary effects challenge for further consideration because it did not appear from the record that the trial court even had the supposedly relied upon studies before it in order to be able to evaluate the plaintiff's challenge to that "evidence." *Id.* at 1169. However, in *Commonwealth v. Jameson*, ___ S.W.3d ___, 2006 WL 3386489 (Ky. Nov. 22, 2006), the Kentucky Supreme Court *reversed* a decision of the state court of appeals which had ruled that the criminal defendant there had successfully "cast doubt upon" the government's rationale for enacting the ordinance provisions at issue there. Yet, similar to the circumstances in *Doctor John's*, the purportedly relied upon "studies" were never even submitted into evidence in the trial court there. *See* App. 2-4 (the Commonwealth putting on no evidence at the hearing); and *Jameson v. Commonwealth*, No. 2003-CA-000967-DG, 2004 Ky. App. LEXIS 229, at **29-30 (Aug. 6, 2004) (Mr. Jameson's evidence was "unrebutted").[2]

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[1] Metro has chosen, in regard to this ruling, to take a cheap shot at the undersigned counsel. Opp. 11 n. 5. Yet, the undersigned did not cite an article which he co-authored as being an "authoritative source," but rather merely pointed out that the *Tenth Circuit United States Court of Appeals* relied upon that paper.

[2] The undersigned was counsel of record for Mr. Jameson in the Kentucky Supreme Court, and further represents this circumstance as an Officer of this Court. In fact, a petition for rehearing is pending based upon the conflict with *Doctor John's* on this issue.

II. THE ISSUES IN THE PETITION REST NOT UPON THE QUESTION OF WHETHER IT IS "DIFFICULT" TO WIN A SECONDARY EFFECTS CHALLENGE, BUT RATHER WHETHER SUCH AN ATTACK CAN BE MOUNTED AT ALL.

In stating that the "legislative record justifying the enactment [of Ch. 6.54] is sufficient to show the evidence the municipality relied upon," that no discovery on that issue may then be permitted, and that the "objective truth of that evidence" is *irrelevant* (Opp. 18 (clarification added)), Metro argues for a rule that once some type of "study" or "report" is placed into the legislative record – no matter how worthless, flawed, out-of-date, or irrelevant to the issues at hand it may be (*i.e.*, the proverbial "junk science"), and regardless of whether any legislator even reviewed such materials – it becomes sacrosanct and immune to attack. As pointed out in the petition, Metro truly does seek a standard that "evidence" of a secondary effects justification for the enactment of a speech-restrictive law is "irrefutable, irrebuttable, and incontestable." Pet. 23. In light of the Sixth Circuit ruling challenged here, that has, indeed, become just the case within that Circuit.

In *Sensations, Inc. v. City of Grand Rapids*, No. 1:06-CV-300, 2006 U.S. Dist. LEXIS 77159 (W.D. Mich. Oct. 23, 2006), the City of Grand Rapids filed a motion under Fed.R.Civ.P. Rule 12(c) to dismiss the entirety of a challenge to its adult business regulatory ordinance, including the plaintiff's secondary effects attack. In citing to and relying upon the Sixth Circuit ruling that is the subject of this petition, the district court concluded that where "the local ordinance is based on controlling cases finding evidence of secondary effects and approving identical

restrictions, discovery may not properly be used to undermine the conclusion reached by those controlling courts." *Id.* at *27.[3] Without then even permitting the plaintiff to mount a secondary effects challenge, the district court there simply granted a motion to dismiss based upon the pleadings. This is where courts are now heading in light of the fractured nature of this Court's opinions on these issues and the Sixth Circuit's ruling in this case. This direction could not have been what this Court contemplated in *Alameda Books*, and the petition should therefore be granted.

III. THE DISCOVERY PRECLUDED BY THE SIXTH CIRCUIT RULING IS NOT LIMITED TO MATTERS PERTAINING TO LEGISLATIVE "MOTIVATION."

Irrespective of the fact that the Rule 30(b)(6) deposition notice at issue here contained thirty-nine areas of inquiry, many of which had absolutely nothing to do with the secondary effects issue at all, Metro attempts to mislead the Court into believing that the sought after discovery was simply a request to examine the motivations of the individual legislators. Opp. 16-20. That is an interesting claim given the fact that no deposition of an individual council member was even noticed, but in any event it misses the point.

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[3] The Fifth Circuit has just concluded that the mere reference to judicial opinions discussing secondary effects, if relied upon at the time of legislative enactment, may alone be sufficient to satisfy the substantial governmental interest test. *Illusions-Dallas Private Club, Inc. v. Steen*, ___ F.3d ___, 2007 WL 764484, at **8-11 (5th Cir. March 15, 2007).

The Sixth Circuit ruling at issue is simply not limited to matters of legislative "motivation" privilege. Rather, the appellate court has issued a *blanket* prohibition against the taking of discovery related to the purported secondary effects justification for the enactment of a speech-restrictive law. Moreover, even the Magistrate's legislative immunity concerns cannot serve as any legitimate basis for the broad protective order that was issued. For example, Plaintiffs sought a simple request for a deponent to testify and identify "[e]ach and every governmental interest meant to be furthered" by the provisions of Ch. 6.54 and any amendments thereto. Pet. App. 376-77 (#'s 7-8). This is not an inquiry into *motivation*, but rather an investigation as to the *basis* for the enactment of the law in the first place, which is necessary because – as pointed out in the Petition – Justice Souter's precedential concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), permits the governmental interests to be "made up" during litigation.[4] Pet. 20-22 & n. 9.[5]

In addition, if, as asserted by Metro, the only form of permissible secondary effects attack relates to whether legislative reliance upon the challenged reports and studies was "reasonable" (Opp. 18), that insures that no

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[4] Although the virtual uniformity of this is also now in question. *See Illusions-Dallas Private Club*, 2007 WL 764484, at **8-11.

[5] The Respondent also attempts to obfuscate the issues when describing the depositions that were allowed. Opp. 21-22. First, again, the Sixth Circuit's ruling is a *blanket* prohibition, and would probably not even permit a number of the areas of inquiry that were conducted in this case. Second, and more importantly, it is not insignificant to note that Metro has failed to discuss any of the testimony concerning the four individuals deposed, as none of it related to the critical matters at hand.

secondary effects challenge can ever be mounted given the fact that the Respondent further notes that the "motivations" of a legislator cannot be investigated. Respondent (and regrettably the Sixth Circuit) have therefore set up the perfect *"catch 22"* where challenging the secondary effects basis for a speech-restrictive law becomes impossible. For this reason, the petition should be granted.

IV. PETITIONERS WERE NEVER AFFORDED A TRIAL ON THE MERITS.

The Respondent does not contend that the district court combined the hearing on the second motion for preliminary injunction with the trial on the merits, as that would be an outright falsehood. Nor does Metro assert that the Plaintiffs were required to put all of their trial evidence into the record at the preliminary injunction stage. All that the Respondent can argue is that – at its request – the Magistrate ordered that the Plaintiffs not piecemeal motions for preliminary injunction, and Plaintiffs do not assert anything to the contrary. It is also significant to note that in her ruling, the Magistrate denied some of the discovery because the requests were *premature in light of the status of the case at that point. See* Pet. App. 119, 124, and 127. A trial, separate and distinct from the preliminary injunction proceedings, was therefore clearly contemplated, as was further discovery. *But Plaintiffs were never permitted any additional discovery after resolution of the second preliminary injunction motion.* Metro is then simply disingenuous when it asserts that the Petitioners "had their day in court." Opp. 23.

Were the Respondent to be correct in this argument, there would have been no basis for the district court to

conduct a conference *after* resolution of the second preliminary injunction motion in order to discuss the preparation of these matters for trial. *See* particularly Pet. App. 423 ("THE COURT: All right. Now, ladies and gentlemen, what needs to be done in this case to get this case ready for trial?"). Finally, and most importantly, once the district court lifted the permanent injunction, there was no longer a final judgment in place and the status of the litigation below remitted to the position of two preliminary injunctions having been litigated, *and nothing more*. At that point, Plaintiffs were entitled to a trial, they never received it, and this petition should therefore be granted.

Dated: March 19, 2007.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION*

DEJA VU OF NASHVILLE, INC., et al.	]	
v.	]	No. 3-97-1066
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	]	Judge Higgins

ORDER

The plaintiffs' second motion (filed December 17, 1998; Docket Entry No. 83) for preliminary injunction is set for hearing on oral testimony on Tuesday, April 13, 1999 at 9 a.m.

Proposed findings of fact and conclusions of law shall be submitted (not filed) directly to the Courtroom Deputy, Ms. Pat Lavorini, by the close of business on Monday, April 12, 1999.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
3-31-99

* Any typographical and/or incorrect punctuation found in the following pages were intentionally left to show accurately how the original documents appeared.

COMMONWEALTH OF KENTUCKY
McCRACKEN DISTRICT COURT
CASE NO: 00-M-01796
CASE NO: 00-M-01797

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

JOANN WARNER DEFENDANT

and

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

EDWARD GREEN JAMESON DEFENDANT

TRANSCRIPT OF EVIDENTIARY HEARING
HON. BARD K. BRIAN, PRESIDING JUDGE
October 18th, 2001

Commonwealth represented by:

Hon. Doug McCann
Asst. County Attorney

Defendant represented by:

Hon. Delbert K. Pruitt
Bryant & Kautz PSC

Witness:

Brent Stringer – E911 Director
Melissa Meyer – Shift Manager – The Playhouse
Joann Warner – Defendant

[3] Judge Brian: Okay, we're here on 00-M-1796, 00-M—1797, *Commonwealth vs. Edward Jameson, Commonwealth vs. Joann Warner*. Is that correct gentlemen?

Mr. Pruitt: Yes sir.

Judge Brian: Mr. Pruitt were you going to submit some proof or testimony sir?

Mr. Pruitt: That's correct sir.

Judge Brian: And I believe after that that's all we need to do unless the Commonwealth wants to have some rebuttal proof is that right?

Mr. McCann: Yes sir. Before we start I would like to put it on the record [inaudible]

Judge Brian: Pardon?

Mr. McCann: Would like to note the Commonwealth's objection to [inaudible]

Judge Brian: And are those on the record?

[4] Mr. McCann: Yes Your Honor.

Judge Brian: Okay and Mr.

Mr. Pruitt: What were those objections, just refresh my memory?

Judge Brian: They've been so long ago I don't know that I know.

Mr. McCann: The primary one is that there's been no authority cited to this Court to authorize the evidentiary hearing, in fact the Supreme Court clearly stated and in our studies from other countries [inaudible]

* * *

[42] Mr. Pruitt: I'll do his deposition.

Judge Brian: Let's see, gentlemen, have at least this much briefing and law to look at. That's just part of it. I think there's some other cases cited that I've read but I haven't printed out so I'm going to go ahead and start I think what is going to be the preliminary matter will be the standard of proof. I don't think I need your deposition to do that. So I'm going to go ahead and start getting to work. It will probably be the following the submission of your deposition, it's gonna be at least a couple of weeks before I get you a written opinion. I take it everybody wants a written opinion.

Mr. Pruitt: Yes sir.

Judge Brian: So it's probably going to be at least two weeks following [43] the submission of your deposition Mr. Pruitt. So the quicker I get the deposition the sooner I can give you an opinion because I'm going to go ahead and start the, again I've already reviewed it but I'm gonna start looking at the law again on the preliminary matter regarding the standard of review. Okay.

Mr. Pruitt: Yes sir.

Judge Brian: All right, anything else?

Mr. Pruitt: No sir.

Judge Brian: Mr. Pruitt, Mr. McCann?

Mr. McCann: Nothing at this time.

Judge Brian: Thank you all.